In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 314

ARNOLD SCHILDHAUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Pet. App. 1a-12a) is reported at 211 F. Supp. 934, *sub nom. United States* v. *Birngold Realty Co.*. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 12a) is reported at 316 F. 2d 240.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1963. The petition for a writ of certiorari was filed on July 27, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

699-205—63

QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner was released from his obligation as accommodation co-maker or guarantor of three notes insured under the provisions of the National Housing Act by reason of (i) an arrangement between the holder and the principal obligor regarding time and amount of installment payments, (ii) negotiation of the notes after maturity to the United States, or (iii) an alleged failure on the part of the United States to refile chattel mortgages securing the notes.

STATEMENT

This is an action brought by the United States on three installment notes, the unpaid principal balances of which are $120.51, $1,480.21 and $1,253.27. These notes were issued in favor of a lender financial institution, insured under the provisions of the National Housing Act, 48 Stat. 1246, as amended, 12 U.S.C. 1702, and assigned to the government after default (App. 3a–7a).[1] The loan underlying each of the notes was made to a corporation of which the petitioner was President. The first two notes were signed by petitioner twice, once as President of the borrowing corporation and again as an individual co-maker (App. 18a, 19a, 24a, 38a). The third note was signed by petitioner only as President but was also guaranteed by him individually.

The first two notes, after specifying the dates on which monthly payments were due, provided that pay-

[1] Citations to "App." refer to Appellee's Appendix in the United States Court of Appeals for the Second Circuit, which has been filed as part of the record in this Court.

ments could be made "at such other times as may be agreed in writing by and between the Bank and any of the undersigned" (App. 24a, 38a). The guaranty in the third [illegible] provided that the time of payment "may be extended, without notice to or further assent from the undersigned" (App. 60a).

The corporation defaulted on each note and the bank declared the remaining principal to be due. Notice was given to petitioner. Upon the payment of certain lump sums, the bank agreed to accept the then remaining balances in monthly installments differing slightly from the installments as originally specified in the notes (App. 24a, 38a, 60a; Pet. App. 13a, 14a).

After further default, the United States fulfilled its insurance obligations, took an assignment of the notes, and instituted this action. The district court entered judgment for the government, holding that petitioner was liable on all three notes. The court rejected petitioner's argument that he was released from the notes by the extensions of time granted by the bank.

The court of appeals, rejecting the same contentions, affirmed on the basis of the district court's opinion.

ARGUMENT

Petitioner raises four issues relating to the law of negotiable instruments which he asserts should be reviewed by this Court. He has not shown, however, that these issues have any general importance; that there is any conflict among the federal courts; or

that the district court's disposition of the case was erroneous.

The district court decided the case as a matter of New York law, while the court of appeals affirmed without stating explicitly whether federal or state law was applicable. Our view is that, under *Clearfield Trust Company* v. *United States*, 318 U.S. 363, federal law is applicable to the question of the defenses available on an FHA-insured note, and that this type of case is not one in which federal law should necessarily adopt local law as the rule of decision. Cf. *United States* v. *Helz*, 314 F. 2d 301 (C.A. 6) (federal law governs question of whether United States can recover against a married woman on an FHA-insured note). However, it does not appear that any of the sources from which a federal rule might be fashioned would support a different result, on the facts of this case, from that reached by the courts below.

1. In support of his contention, with respect to the first two notes, that he was released by the extensions of time, petitioner relies principally upon two treatises, both of which criticize the rule applied by the courts below but acknowledge that it is the majority rule (Pet. 6). Whether the federal courts should adopt the minority rule and hold that an accommodation co-maker is released by an extension of time to which he does not consent might be an interesting question in another case, although it seems doubtful that a federal rule should be fashioned which would give accommodation co-makers a defense against the United States not available in the majority of states.

In this case it appears that the first two notes provided for payment "at such other time as may be agreed in writing by and between the Bank and any of the undersigned" (App. 24a, 38a). Thus it is clear that petitioner, by signing the note, consented to an extension of time as agreed to by the bank and the corporation. Accordingly, the question which petitioner would raise is not actually presented.

2. Contending that the government should not be able to sue an accommodation co-maker on notes negotiated to it after maturity, petitioner again relies upon a commentator who notes a split of authority on this point (Pet. 7). The view taken by this commentator (and by some state courts) is that a prohibition against negotiation after maturity is an implied term of the agreement between an accommodation co-maker and the payee. Here, however, the courts could not, on any view of the law, imply such a restriction. Petitioner executed Federal Housing Administration Title I Credit Applications in connection with these notes (App. 26a, 40a, 64a, 18a-21a). As its regulations make plain, the Federal Housing Administration insures this type of note by agreeing to purchase upon default after maturity. 24 C.F.R. 200.177, 200.178. Thus petitioner can hardly argue that an implied term of *his* agreement with the Bank was a prohibition against negotiation to the Federal Housing Administration after maturity.

3. Petitioner's contention that he was released from his obligations by an alleged failure of the United States to refile chattel mortgages securing the notes has no factual basis in the record before this Court.

Moreover, even on petitioner's assumption, it would not follow that the courts below erred. It is not alleged that plaintiff released the collateral, but merely that the chattel mortgages were not refiled. Since failure to refile a chattel mortgage in New York affects validity only as against third parties (Section 235, New York Lien Law), and there is no reason to suggest that this failure should have any different effect under federal law, there would be no impairment of collateral unless the present obligors on the mortgages had become insolvent or had resold or remortgaged to a purchaser or mortgagee taking in good faith. There is no allegation that any of these events has occurred. Nor is there any allegation as to the value of the collateral and the extent of any impairment that may have taken place.

4. Petitioner's final contention relates solely to his guaranty of the third note. He apparently concedes, as he must, that he consented in advance that "the time for payment * * * may be extended" (App. 60a). He then attempts to avoid the effect of this concession by arguing that the Bank "changed the terms of the original contract," and that this is accordingly not "merely an extension of time." What the Bank did was to agree, upon payment of a binder of $200, to accept monthly payments of $50 on a note originally providing for monthly installments of $49.89. (App. 60a, Pet. App. 14a). Petitioner fails to point out that a "mere extension of time," as he defines it, would have extended the period for payment past the point provided for in the Bank's arrangement and would thus have increased petitioner's

risk as guarantor. Plainly, then, the contention is without substance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
SHERMAN L. COHN,
ROBERT V. ZENER,
Attorneys.

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